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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Donald Lee Dinwiddie and Lydia A.)
Dinwiddie,)

No. CV-14-00180-PHX-SPL

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Plaintiffs,)

ORDER

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vs.)

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United States of America,)

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Defendant.)

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Before the Court is Defendant’s motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. (Doc. 7.) For the reasons that follow, the motion will be denied without prejudice.¹

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I. Background

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This action arises from an October 2011 collision in Yuma, Arizona between vehicles driven by Plaintiff Donald Lee Dinwiddie and an employee of the United States Department of the Army, Michael Gregary Csintyan (“Csintyan”). Plaintiff brings claims against the United States under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(b), alleging that the collision was caused by Csintyan’s negligent operation of his vehicle, and that the United States, through the Department of the Army, negligently entrusted a rented vehicle to Csintyan knowing that he posed a danger to other drivers. (Doc. 1 at ¶¶ 11, 12.) Plaintiff Donald Lee Dinwiddie seeks special and general damages,

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¹ The request for oral argument is denied because the issues have been fully briefed and oral argument will not aid the Court’s decision. *See* Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

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1 and his wife, Lydia A. Dinwiddie, alleges loss of consortium. (Doc. 1 at 3.)

2 **II. Legal Standards**

3 The FTCA waives sovereign immunity to allow the United States to be held liable
4 for torts committed by a federal employee “in the same manner and to the same extent as
5 a private individual under like circumstances.” 28 U.S.C. § 2674. A threshold
6 requirement to establish subject-matter jurisdiction under the FTCA is that the federal
7 employee must have been acting within the scope of his employment when the tort was
8 committed. 28 U.S.C. §§ 1346(b)(1), 2679(b)(1).

9 “The defense of lack of subject matter jurisdiction cannot be waived, and the court
10 is under a continuing duty to dismiss an action whenever it appears that the court lacks
11 jurisdiction.” *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing Fed.
12 R. Civ. P. 12(h)(3)). A party may bring a facial or factual attack on subject-matter
13 jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See Safe Air for*
14 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A “facial attack” accepts the
15 truth of the complaint’s allegations, but asserts that they are “insufficient on their face to
16 invoke federal jurisdiction.” *Safe Air for Everyone*, 373 F.3d at 1039. By contrast, a
17 “factual attack” challenges the truth of the complaint’s allegations, and asserts that
18 federal jurisdiction does not exist in fact by introducing evidence outside the pleadings.
19 *Id.*

20 In resolving a facial attack, the Court accepts the allegations as true, draws all
21 reasonable inferences in plaintiff’s favor, and “determines whether the allegations are
22 sufficient as a legal matter to invoke the court’s jurisdiction.” *Leite v. Crane Co.*, 749
23 F.3d 1117, 1121 (9th Cir. 2014). In resolving a factual attack, the Court need not accept
24 the truthfulness of the plaintiff’s allegations and, in considering evidence outside the
25 pleadings, determines if plaintiff has proven by a preponderance of the evidence that
26 subject-matter jurisdiction exists. *Safe Air for Everyone*, 373 F.3d 1035; *Leite*, 749 F. 3d
27 at 1121. “[I]f the existence of jurisdiction turns on disputed factual issues, the district
28 court may resolve those factual disputes itself” without converting the motion to dismiss

1 into a motion for summary judgment. *Leite*, 749 F. 3d at 1121-22; *Safe Air for Everyone*,
2 373 F.3d at 1039. However, the district court “must leave the resolution of material
3 factual disputes to the trier of fact when the issue of subject-matter jurisdiction is
4 intertwined with an element of the merits of the plaintiff's claim.” *Leite*, 749 F.3d at 1122
5 fnt. 3; *see also Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005); *Safe Air for*
6 *Everyone*, 373 F.3d at 1039.

7 **III. Discussion**

8 In the instant motion, Defendant argues that Csintyan was not acting within the
9 course and scope of his federal employment pursuant to Arizona law at the time of the
10 collision. (Doc. 7 at 8.) Bringing a factual attack on subject-matter jurisdiction,
11 Defendant has submitted evidence outside the pleadings, namely, an affidavit from
12 Csintyan’s supervisor, James Cope, who states that at the time of collision Csintyan was
13 driving back to his hotel after work hours and was off-duty. (Doc. 7-1 at ¶¶ 3, 5.) In
14 response, Plaintiffs argue the contrary; Csintyan was acting within the course and scope
15 of his employment at the time of the collision because, among other reasons, he was
16 driving a government-rented vehicle and was working away from home on Army
17 assignment. (Doc. 9 at 2.) Plaintiffs also contend that Defendant’s motion is premature
18 and request that discovery be permitted so that they can investigate material jurisdictional
19 facts and meet their burden of proof.

20 First, the Court agrees that at this juncture further discovery is appropriate. Here,
21 the “pertinent facts bearing on the question of jurisdiction are in dispute.” *Am. West*
22 *Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989). Although Cope
23 declares that Csintyan was off-duty at the time of the collision, there are sufficient factual
24 allegations to support a claim that Csintyan was acting within the scope of his
25 employment such that discovery into those facts is warranted. (Doc. 9-1 at 2.) *Cf. Pebble*
26 *Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006) (denying discovery where there
27 was an insufficient basis for asserting jurisdiction). Indeed, this case is largely
28 undeveloped and the need for discovery is evident by the very absence of any direct

1 account by Csintyan of the circumstances surrounding the collision.

2 Further, it is not clear whether the determinative jurisdictional facts will bear
3 directly on the merits. For example, the facts revealed surrounding Csintyan's
4 competence to drive at the time of the collision may bear directly on both the question of
5 whether he was acting within the scope of his employment and the merits of Plaintiffs'
6 negligent entrustment claim.² As such, discovery has the potential to not only shape the
7 parties' arguments, but dictate the legal standard governing briefing on jurisdiction. The
8 motion to dismiss will therefore be denied without prejudice, and Defendant may renew
9 its motion on subject-matter jurisdiction following adequate discovery.

10 Lastly, Defendant requests that discovery and briefing be confined to the question
11 of subject-matter jurisdiction. Defendant contends that "Csintyan's potential personal
12 liability will be affected by this issue" and, should the Court determine that the United
13 States is immune from suit, Csintyan may "find it in his interest to obtain his own
14 counsel." (Doc. 14 at 3.) This request will be denied. Because Defendant argues that
15 Csintyan, not the United States, is liable for any collision damages, his interests *are* at
16 issue; nothing suggests that limiting the scope of litigation to the jurisdictional question
17 would shelter those interests. In developing jurisdictional facts, Plaintiffs seek to take
18 Csintyan's deposition. (*See* Doc. 9 at 5.) His testimony concerning the collision will
19 undoubtedly influence the finding on whether he can be sued personally.

20 **IV. Conclusion**

21 Finding that discovery should be allowed, the Court will deny the motion without
22 prejudice and call Defendant to answer the Complaint. Thereafter, the Court will set a
23 case management conference and the blueprint for case discovery. Accordingly,
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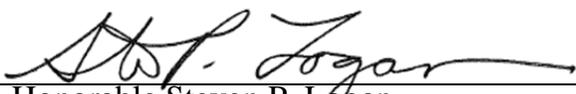
25 ² To establish a negligent entrustment claim under Arizona law, a party must prove:
26 "(1) that Defendant owned or controlled a vehicle; (2) Defendant gave the driver
27 permission to operate a vehicle; (3) the driver, by virtue of his physical or mental
28 condition, was incompetent to drive safely; (4) the Defendant knew or should have
known that the driver, by virtue of his physical or mental condition, was incompetent to
drive safely; (5) causation; and (6) damages." *Acuna v. Kroack*, 128 P.3d 221, 227 (Ariz.
Ct. App. 2006).

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IT IS ORDERED that Defendant's Motion to Dismiss (Doc. 7) is **denied without prejudice.**

IT IS FURTHER ORDERED that Defendant shall have until **September 12, 2014** to file an answer to the Complaint (Doc. 1).

Dated this 29th day of August, 2014.


Honorable Steven P. Logan
United States District Judge